

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

900 MHz Applications Freeze
and

Various Applications Pending For 900 MHz
Channels Filed By ACI 900, Inc.

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DA-04-3013
WT Docket No. 02-55

**PETITION FOR RECONSIDERATION
EXPEDITED TREATMENT REQUESTED**

Small Business in Telecommunications (SBT) a consistent commenter in Docket 02-55, whose members include licensees of 900 MHz channels for the operation of legitimate businesses throughout the United States, hereby respectfully requests reconsideration of the Commission's freeze on acceptance of applications for use of channels in the 896-901/935-940 MHz bands, which freeze was adopted by Public Notice on September 17, 2004 (DA-04-3013) ("Notice"). SBT requests, for the reasons provided herein, that the Commission immediately reconsider and set aside its decision to freeze the acceptance of applications for 900 MHz channels and to take that other action suggested herein.

The Commission's rationale for adopting the freeze is based on its receipt of hundreds of applications from a single entity, ACI 900, Inc., a wholly owned subsidiary of Nextel Communications, Inc. (ACI) Although SBT joins with the Commission and others¹ in its extreme concern regarding this blatant attempt by ACI to consolidate under one entity the future use of the

¹ See, Letter comment to Michael Wilhelm from United Telecom Council dated September 23, 2004; Informal Opposition of Verizon Wireless to various applications submitted by ACI 900, Inc. filed September 14, 2004.

900 MHz band, SBT respectfully and strongly urges the Commission to address this problem by means other than the freeze. The effect of the freeze does nothing to ameliorate the agency's concerns and, instead, works as a prejudice against all other *legitimate* applicants and existing users who would require additional spectrum to continue their honest business efforts.

SBT notes that the Commission's justification for the freeze is tied to its *Report and Order*, *Fifth Report and Order*, *Fourth Memorandum Opinion and Order*, and *Order* in WT Docket 02-55 (released August 6, 2004) ("Order"). In its Notice, the Commission stated that "Nextel may require additional 900 MHz authorizations . . . to preserve adequate service to its subscribers." Notice at ¶ 2. And that "additional such filings may compromise Nextel's ability to obtain the necessary "green space" to house some of its systems while the 800 MHz band is reconfigured..." Notice at ¶ 3. However, SBT respectfully directs the Commission's attention to the content of the ACI applications which request use of the channels for internal, non-commercial purposes. Thus, the reported, intended use of the channels by ACI is at odds with the Commission's description and purposes and does not factually support the Commission's treatment of those applications.

Nor can the Commission's justification be found in the plain language of its Order. The Order makes no suggestion that in addition to that 900 MHz spectrum which Nextel was allowed to keep (despite the fact that it has failed to build out to provide any services to the public in accord with the terms of Nextel's licenses), Nextel would also be allowed to further warehouse additional 900 MHz spectrum in a manner which is contrary to existing rule and law. Accordingly, the Notice

acts as an order on reconsideration of the Commission's Order, without the benefit of required notice and comment.

SBT further notes that the Commission's action results in a material change in its Order, which Order does not speak to the availability of 900 MHz spectrum, not presently licensed to Nextel, for use in the manner described in the Notice. Accordingly, the freeze appears to violate the Commission's duty to engage in open and public notice and comment rule making. It further violates the specific elements of Administrative Procedures Act by its reliance on an order that has not been published in the federal register for the mandated thirty-day period and, thus, is ineffective legally. Yet, despite this obvious lacuna in legality, the Commission's action effectively ignores the dictates of the APA and the clear language of its Order, in favor of an impermissible, selective action that arbitrarily favors the interests of a disingenuous applicant over the needs of legitimate PLMR applicants and licensees.


That the ACI applications are wholly defective and disingenuous on their face is admitted by the Commission's explanation for adoption of the freeze. The Commission's justification cannot be reconciled with the averments within each application that the channels will be used for non-commercial, internal purposes. Thus, the Commission has found that the ACI applications are, in essence, a sham and should, therefore, be subject to dismissal as, in their totality, a clear abuse of the Commission's processes. That the Commission's freeze notice attempts to legitimize these errant applications is quite unfortunate, but the agency's Notice cannot modify by fiat the

Commission's existing rules, while ignoring the protections under the APA and the long history of Commission case law that discourages these types of spectrum warehousing.

For the reasons stated above, SBT respectfully requests that the Commission reconsider its Notice freezing acceptance of 900 MHz applications, and to take such actions against the ACI 900, Inc. applications in accord with rule and law.

Respectfully submitted,
SMALL BUSINESS IN TELECOMMUNICATIONS

By


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